Supreme Court, U.S.
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CASE NO. _____

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IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

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1994-1995 TERM

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ROBERT W. HARTNAGEL, Petitioner

V.

GENERAL MOTORS CORPORATION, Respondent

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI

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Appellant
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## A. QUESTIONS PRESENTED FOR REVIEW

1. Where a lawsuit incorporating a claim of sex discrimination based on disparate impact was initiated prior to calendar year 1989 and brought to trial following enactment of the Civil Rights Act of 1991, does a court below create a Separation of Powers conflict under Article III, Section 2 of the United States Constitution and abridge a plaintiff's Fourteenth Amendment due process rights by ruling that the Act was "not retroactive" and would "not be applicable" at trial?

a. Does such a determination have the effect of imposing on a prospective basis a procedural disparate impact burden of proof standard which did not exist when the disputed conduct occurred or when the lawsuit was filed and which, prior to the commencement of trial, had been intentionally overruled and replaced by a Federal statute?

b. When Congress enacts a law with the stated purpose of overruling a procedural trial standard created by a decision of the Supreme Court of the United States, does enactment of the statute prevent continued retroactive

operation of the overruled standard in trials occurring after the effective date of the law?

c. Where a plaintiff has demonstrated that a respondent uses a particular employment practice that causes a disparate impact on the basis of sex, does a defendant in a post-Act trial of a pre-1989 lawsuit meet the existing statutory burden of proof responsibilities by demonstrating a "business justification" explanation for the identified adverse practice?

d. Is a plaintiff denied a full and fair opportunity to support a claim of unlawful sex discrimination reflecting the continuing 28-month application of a facially neutral employment practice when, at the midpoint of trial, an evidentiary temporal limitation is imposed preventing the introduction of any trial exhibits or testimony reflecting any adverse gender impact which occurred more than 325 days prior to the plaintiff's displacement from active employment?

2. Have courts of the Fifth and Sixth Circuits misinterpreted controlling state case law by creating a federal judicial doctrine

which assigns an unequivocal at-will meaning to Michigan and Texas employment contracts which stipulate that "employment under the agreement will be from month to month only on a calendar month basis" where no supplemental express understanding has been reached between the parties specifically relieving the employer of an obligation to provide "just cause" notice of termination during and within the operation of an established contractual calendar month period of employment?

a. Does such an at-will interpretation, occurring in conjunction with a trial proceeding conducted seven months after the contractual employment relationship had ended provide an appropriate bas s for withholding a breach of contract instruction seeking a jury determination of the fact issue applicable to a Texas employee's reasonable reliance on an express promise of Job Security?

3. Does a federal Court of Appeals exceed the discretion authorized in Taylor v. McKeithen, 407 U.S. 191, 194 at note 4, 92 S.Ct. 1980, 1982, 32 L.Ed.2d 648 (1972) and

impair an appellant's Fourteenth Amendment due process rights by using the administrative mechanism of "Affirmance Without Opinion" to dispose of issues properly raised on appeal which present matters of significant legal precident and require new interpretations of federal and state law?

## B. LIST OF PARTIES

Names of all parties appear in the captions of the case.

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D. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The district court and court of appeals decisions are unreported.

E. STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED

(i) Date of Decision of U.S. Court of Appeals for the Fifth Circuit sought to be reviewed: September 6, 1994.

(ii) None

(iii) Inapplicable

(iv) The jurisdiction to review the judgement below rests on 28 U.S.C. 626 (c) (1).

F. THE STATUTES AND REGULATIONS INVOLVED IN THE CASE

The Civil Rights Act of 1991 (Public Law 102-166, 105 Stat. 1071) (CRA-91) describes the purposes of the Act, in pertinent part, as follows:

> "An Act...To amend the Civil Rights Act of 1964 to strenghten and improve Federal civil rights laws...to clarify provisions regarding disparate impact actions, and other purposes...
>
> "The Congress finds that--
> (2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections...
>
> "the purposes of this Act are--

(2) to codify the concepts of "business necessity" and "job related" as enunciated in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio...

"to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964..."

"SEC. 105 BURDEN OF PROOF IN DISPARATE IMPACT CASES.

"(k)(1)(A) An unlawful employment practice based on disparate impact is established only if--

"a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistant with business necessity..."

"Subsection 402(a) [e]xcept as otherwise specifically provided, this Act and the ammendments made by this Act shall take effect upon enactment."

Applicable provisions of the United States Constitution include the following:

Article I. Section 10 provides, "No State shall...pass any...law imparing the obligations of contracts..." Article III. Section 2 (b) provides ..."the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make." The Fourteenth Amendment provides, ..."nor shall any State deprive any person of life, liberty, or property, without due process of law;"

G. CONCISE STATEMENT OF THE CASE

a. NATURE OF THE CASE

Plaintiff Robert W. Hartnagel was a 49 year old, mid-management, General Motors employee, with 26 years of service and consistantly Superior performance ratings when, in October, 1986, he was informed that the position he held was being "eliminated" as a result of a merger of two adjacent regional GM operating units.

Despite the existance of an express promise of Job Security based on comparative length of service, which was applicable to "any reduction in force situation," the job functions of the three employees in Hartnagel's 7-state territory, which was said to have been "closed," were assigned to three lesser service employees in the adjoining regional territory which was said to have remained "open." Hartnagel's request to be permitted to transfer on a length of service basis into the combined operation was denied. A well-recognized medical hardship situation was severely impacted by this decision.

After two subsequent requests for

reconsideration of this decision were rejected, Hartnagel submitted a formal complaint under General Motors' "Open Door" program.

Following completion of the merger, a previous offer of employment was withdrawn and his employment options were reduced to a single choice: acceptance of "voluntary" separation on a cash buyout basis. He then was denied reassignment for nine months before being placed on involuntary layoff status. Shortly before the scheduled commencement of the trial of this lawsuit, he was recalled to a presumed management position which in fact imposed an extended "second residence" work assignment, creating intolerable conditions and ending in final separation.

b. PROCEEDINGS IN THE COURTS BELOW

This action was brought by Robert W. Hartnagel on April 29, 1988 against General Motors Corporation for discriminaton on the basis of age in violation of 29 U.S.C. 621, et. seq. and on the basis of his sex in violation of 42 U.S.C. S 2000e-2(a) and for breach of contractural agreements governing his employment. At the conclusion of trial on

January 30, 1992, the jury returned a verdict stating that "Hartnagel did not prove" by a preponderance of the evidence that GM had discriminated against him or constructively discharged him because of his age or because of his sex. Notice of appeal was filed on March 2, 1992.

Following this Court's decisions on April 26, 1994, regarding certain considerations regarding "retroactive" application of the Civil Rights Act of 1991 (CRA-91), Hartnagel was granted permission to submit a Supplemental Brief describing the relevance of these decisions to the issues addressed in this appeal.

The court below ordered on September 6, 1994 that Hartnagel's appeal was concluded, without oral argument, under Local Rule 47.6. Requests were filed seeking Panel Rehearing (Denied 10/27/94), En Banc Rehearing (Denied 10/27/94), Stay of Mandate and Petition for Certification of a Question of Law the the Supreme Court of Texas (Denied 11/28/94).

C. STATEMENT OF FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

1. In response to appellant's motion to

supplement the official record of this proceeding, the district court issued an order on November 20, 1992, stating in pertinent part,

> "...the rulings made by this Court concerning...the applicability of the Civil Rights Act of 1991...are contained in the record filed with the Fifth Circuit."

Petitioner has been unable to identify any document in the official record which reflects this specific ruling. As a result, the references to the district court's findings which are incorporated in this petition are based on Hartnagel's afidavit describing the statements which were made from the bench in his presence and on the specific pleadings which are contained in the supplemental record on appeal. These pleadings reflect the efforts appellant has made to clarify this matter during the course of the proceeding in the court below. The official trial transcript does not reflect the portion of the trial proceeding wherein this ruling was made.

There has been no assertion by General Motors that this ruling was not made as petitioner has described it, and the trial

court's determination moreover was entirely consistant with the posture adopted within the Fifth Circuit regarding retroactive application of CRA-91. This explanation is intended solely for the purpose of identifying the source of the quotations which have been used here, and not because any dispute is believed to exist with respect to the substance of the ruling itself.

H. (INAPPLICABLE)

I. BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE.

The U.S. District Court for the Northern District of Texas, Dallas Division had original jurisdiction due to federal questions raised under 29 U.S.C. S 621 et. seq.; 42 U.S.C. S 2000-2(a); and 29 U.S.C. 626 (c) (1).

J. DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Despite the extensive direction this Court has provided in its Landgraf v. USI Film Products and Rivers v. Roadway Express Inc. decisions, more than three years after its enactment, the Civil Rights Act of 1991 continues to reflect major uncertainties of

compelling national significance and concern.

Petitioner contends that the intent of Congress to both overrule and replace the burden of proof formulation established in Wards Cove Packing Co. v. Atonio, which became codified upon enactment of CRA-91, removed any authority for assigning this burden in trial proceedings commencing after November 21, 1991, where the lawsuit had originated prior to June 4, 1989.

As an unavoidable prospective consequence of this legislation (as opposed to a retroactive application of the statute itself), this proof formulation therefore ceased to exist as an appropriate standard for trials of pre-1989 lawsuits conducted from that point forward. The clear statement of Congressional intent which is incorporated in the statute had the effect of "mandating the absence" of the Wards Cove burden and reinstating the proof standard which existed at the point this lawsuit was filed. Application of the overruled standard produced a substantial injustice when this case was brought to trial.

Petitioner argues that a federal judicial

doctrine which assigns an unequivocal at-will meaning to an express contract which provides that employment under the agreement will be "from month to month only on a calendar month basis" reflects a misinterpretation of state law and an misunderstanding of the employment circumstances applicable to this lawsuit.

Such a contract does not prevent an employee's reasonable reliance on an express promise of Job Security under Texas law. The fact issue dealing with this reliance was properly a matter for jury determination. The trial court's application of this federal doctrine to prevent submission of a breach of contract question to the jury exceeded the judicial authority granted by the U.S. Constitution and abriged the plaintiff's Fourteenth Amendment rights.

1. PROSPECTIVE AND RETROACTIVE OPERATION OF A JUDICIALLY-CREATED PROCEDURAL TRIAL STANDARD IS SUBJECT TO LIMITATIONS IMPOSED BY SEPARATION OF POWERS PROVISIONS OF THE U.S. CONSTITUTION.

The lawsuit addressed in this petition was filed on April 29, 1988. The Supreme Court of the United States rendered a decision in its review of Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 109 S. Ct. 2115 (1989) on June 5,

1989. The Civil Rights Act of 1991 (CRA-91) was enacted on November 21, 1991. This case was brought to trial two months after CRA-91 was enacted.

Article III, Section 2 (b) of the United States Constitution states:

> "...the Supreme court shall have appellate jurisdiction both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make"

In conjunction with this Court's review of Landgraf v. USI Film Products, ___ U.S. ___ , 114 S. Ct. 1483 (1994), Justice Scalia wrote,

> "...the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised. Thus, applying a jurisdiction-eliminating statute to undo past judicial action would be applying it retroactively; but applying it to prevent any judicial action after the statute takes effect is applying it prospectively."

Petitioner Robert W. Hartnagel argues:

(1) Separation of Powers provisions of the United States Constitution prohibit the prospective application of a judicially-created procedural trial standard which has been overruled by a federal statute when that standard was not in existance at the point the lawsuit was filed.

(2) The Civil Rights Act of 1991 codifies the intent of Congress to both overrule and replace the disparate impact burden of proof standard created by the Wards Cove Packing Co. v. Atonio decision. This direction was to take effect upon enactment of the statute.

(3) In post-Act trials of lawsuits which were filed prior to June 4, 1989, the Courts below have exceeded the judicial authority granted under Article III, Section 2 of the United States Constitution and abridged plaintiffs' Fourteenth Amendment due process rights by continuing to apply on a prospective basis a Wards Cove-based procedural disparate impact burden of proof formulation which was overruled by Congress on November 21, 1991.

The Wards Cove decision was the law of the land at no time when the events which led to petitioner's lawsuit were taking place, nor was this decision in existance at the point when the lawsuit was filed. Respondent General Motors did not rely on the Wards Cove decision when these events occurred, and neither should it have been relied on after the procedural burden of proof standard it created was

overruled and replaced by Congress two months before the trial commenced.

a. THE STATUTORY DIRECTION PROVIDED IN CRA-91, IN CONCERT WITH WELL-RECOGNIZED PRINCIPLES OF LAW, MANDATE THE ABSENCE OF AN OVERRULED WARDS COVE-BASED DISPARATE IMPACT BURDEN OF PROOF FORMULATION IN POST-ACT TRIALS OF PRE-1989 LAWSUITS.

In Landgraf v. USI Film Products and Rivers v. Rodeway Express, Inc., ___ U.S. ___, 114 S. Ct. 1510 (1994) this Court determined that CRA-91 does not evince any clear evidence of congressional intent as to whether the the particular features of the Act pertaining to these two lawsuits applied to cases arising before the Act's passage. Unlike the provisions of the Act which were addressed in the Landgraf and Rivers decisions, the statutory direction provided regarding the Wards Cove disparate impact burden of proof standard is both explicit and restrictive.

As a result, precisely the same judicial retroactivity principles which are articulated in Landgraf and Rivers with respect to the non-disparate impact proof features of the Act exert a quite different--and in certain respects, even opposite effect--as they apply

to a consideration of the prospective application of the Wards Cove proof standard in trials occurring after the enactment of CRA-91.

First, by specifically directing that a law which both overrules and replaces a judicially-created procedural trial standard is to become effective upon enactment, Congress has removed any basis for applying judicial "default" rules as a means of determining the "proper reach" of the burden of proof requirements the statute creates.

Second, it is the same clear statement of intent which argues decisively against the continued retroactive operation of an overruled Wards Cove proof formulation in subsequent trials involving lawsuits which predate the Supreme Court's Wards Cove decision. Such an application has the effect of imposing a "new duty" on a "transaction already completed" and conflicts directly with the principle which holds that the legal effect of conduct should be assessed under the law which existed when that conduct took place.

Third, while a judicial construction represents the controlling and authoritative

interpretation of what an existing law means both before or after the decision was rendered, such an interpretation does not take precidence beyond the point where Congress enacts a new law. Judicially created trial standards are not controlling with respect to "prospective judicial action" which occurrs after the standard has been overruled.

Where, as in this instance, a procedural trial standard is created by statute which shifts the burden of proof from one party to another at trial--returning the law to what existed at the point the lawsuit was filed--absent some specific direction to the contrary, that change becomes applicable to trials which occurr from that point forward irrespective of any other interpretation which may have been applicable under a prior judicial construction.

Finally, the statutory requirements which are incorporated in CRA-91 provide no indication that Congress either outhorized or intended to permit a continued prospective application of the same proof formulation this legislation was enacted to replace.

b. STATUTORY SPECIFICATIONS INCORPORATED IN CRA-91 CONFIRM THE INTENT OF CONGRESS TO REINSTATE A PRE-WARDS COVE DISPARATE IMPACT BURDEN OF PROOF FORMULATION.

Section 105 (k)(1)(A) of the Act states:

> "An unlawful employment practice based on disparate imapact is established under this title only if (emphasis added)--
>
> "(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the practice is job related for the position in question and consistant with business necessity..."

The "Purposes" section states that the Act was intended to "confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964..." (emphasis added) This declaration expresses a clear and unmistakable direction that, when a suit is adjudicated--from the effective date of the statute forward--CRA-91 is to be the controlling statutory authority for that adjudication.

Black's Law Dictionary defines the term "adjudication" as,

> "The formal giving or pronouncing of a judgement or decree in a court proceeding; also, the entry of a decree by a court in respect to the parties in a

> case. Samuel Goldwyn, Inc. v. United Artists Corporation, C.C.A.Del., 113 F2d 703, 706. Tt implies a hearing by a court, after notice, of legal evidence on the factual issues(s) involved. Genzer v. Fillip, Tex.Civ.App., 134 S.W..2d 730, 732.

Petitioner argues that the limitation which is implicit in the specification "only if" both confirms and codifies the intent of Congress to return the prospective disparate impact burden of proof responsibilities of plaintiff and defendant at trial to what existed at the point this lawsuit was originated. As a result, this provision became the authoritative statement of law with respect to the procedural disparate impact proof requirements which were in fact applicable when this case was brought to trial. With respect to pre-1989 lawsuits, this definition had the effect of replacing any judicially-created doctrine which conflicted with or varied from the new statutory standard in trials occurring after November 21, 1991.

1) EVOLUTION OF DISPARATE IMPACT THEORY: Under traditional disparate impact doctrine, first outlined in Griggs V. Duke Power Co., 401 U.S. 424, 431 (1971) the plaintiff bears the

initial burden of proving a prima facie case of disparate impact. The plaintiff can meet this burden by showing that a particular device or procedure used by the employer in the selection or promotion of employees had adversely affected members of a protected class. The burden then shifts to the defendant to persuade the court that use of the particular device or procedure was dictated by "business necessity" and had a "demonstrable relationship to successful performance of the jobs for which it was used." If such a demonstration is made, a plaintiff can still prevail by proving that the defendant's justification is a pretext for discrimination. Both the burden of persuasion and burden of production shift at each stage in the litigation.

In Wards Cove Packing Co. v. Atonio, this Court altered traditional disparate impact in three significant ways. First, the specificity with which plaintiffs had to identify the challenged employment procedure was increased. Under Wards Cove, a plaintiff could no longer identify a group of practices that together had a disparate impact, but rather was required to

prove a causal connection between each one and the identified impact. Second, the defendant's burden with respect to the business necessity defense was reduced. Wards Cove held that the burden of persuasion never leaves the plaintiff, and therefore, defendants faced only a burden of production, not the burden of proving necessity.

Finally, the "business justification" requirement adopted in Wards Cove called for a determination that "the challenged practice served, in a significant way, the legitimate employment goals of the employer." This standard was met "when the practice advanced broader business goals of the defendant," rather than only when the practice was used to determine the employees' abilities to perform the particular job to which the procedure was applicable.

2) STATUTORY DIRECTION OVERRULING WARDS COVE REQUIREMENTS:

Early in the two year debate which preceded final emactment of this statute, both sides accepted that the Act should shift the burden to the defendant to prove business necessity. (137 Cong. Rec. S15,363 [daily ed.

Oct. 29, 1991]) The language of the Act is explicit enough to rule out the definition adopted in Wards Cove. First, by stating that an unlawful employment practice is established when a plaintiff demonstrates the disparate impact of a practice and the employer cannot prove that "the challenged practice is job related for the position in question and consistant with business necessity," Section 105 of the Act sufficiently defines the burden of proof in disparate impact cases to rule out the Wards Cove definition of business necessity. This language is transferred directly from Griggs, and adopts the standard the Griggs Court considered the very "touchstone" of business necessity. The Act could have codified the Wards Cove language of "business justification" or "legitimate business needs of the employer." By choosing the Griggs "business necessity" language, Congress indicated its intent to ground the test in terms of what it meant in Griggs.

Both the Purposes section and an interpretive memorandum reflecting the agreed exclusive legislative disparate impact history

of the Act state that Congress intended to codify the concepts of "business necessity" that were enunciated by the Supreme Court in Griggs. This conclusion is also indicated by the fact that Congress adopted the same language as the Americans With Disabilities Act employs to define business necessity, requiring the employer to prove a close connection between the challenged practice and the employee's ability to perform the job.

A number of other aspects of the Act indicate that Congress intended to reject the general theoretical approach of narrowing the application of disparate impact doctrine, most dramatically, by responding specifically, not just to one, but to six different Supreme Court decisions which narrowed the scope of civil rights in the employment field. The Findings and Purposes sections of the Act confirm an intent to "provide additional protections against unlawful discrimination" and that "the decision of the Supreme Court in Wards Cove...has weakened the scope and effectiveness of Federal civil rights protections." (See "The Civil Rights Act of 1991: The Business

Necessity Standard," Harvard Law Review, Vol. 106, No. 4, February, 1993)

The decision of Congress to codify a separate cause of action for disparate impact, distinct from the cause of action for intentional discrimination, as well as the its decision to shift the burden of proof to the defendant at the second stage of litigation--upon enactment of CRA-91--stands in significant tension with any assertion that the Act simply represents a reaffirmation of existing law. The "only if" limitation imposed by Section 105 (k)(1)(A) and the direct references in the Act to returning to Griggs concepts reveals instead that the intent of Congress which was codified in CRA-91 was distinctly at odds with the doctrine which both arose and was overruled between the time of the filing and the trial of this lawsuit.

A determination by a trial court calling for a continuation of a Wards Cove proof formulation which, prior to the commencement of trial, had been specifically overruled by Congress created a substantial injustice. The ruling is reversible error.

c. ASSIGNMENT OF AN OVERRULED WARDS COVE BURDEN OF PROOF STANDARD FOLLOWING ENACTMENT OF CRA-91 CREATED A MANIFEST INJUSTICE AT TRIAL.

In the course of this appeal, petitioner Robert W. Hartnagel has argued that the court below erred in failing to comply with the procedural requirements which became effective upon enactment of CRA-91 with respect to the allocation of disparate impact burden of proof responsibilities between plaintiff and defendant at trial and in failing to provide a disparate impact jury instruction.

In the original and amended complaints discribing the cause of action in this lawsuit, as well as in comprehensive pre-trial pleadings, trial testimony and documentary evidence admitted at trial, Hartnagel identified a facially neutral employment practice which was utilized throughout a major reduction in force occurring within his immediate work group. A direct causal relationship linking the identified employment practice to the substantial adverse age and gender impact the practice had produced also was demonstrated at trial. This showing exceeded the prima facie case requirements

assigned to plaintiffs under both pre-Act and a post-Act burden of proof standards.

The district court refused to grant respondant's motion for a directed verdict at the close of Hartnagel's case in chief, and expressed an intention to defer any action on the motion until all evidence in the trial had been presented. Because the official record does not preserve any of the trial judge's perceptions or conclusions regarding the respective proof demonstrations made by either party at the first or second stage of the disparate impact case presentations, it cannot be determined from the trial record precisely what basis the district court employed to reach its subsequent decision to withhold a proposed disparate impact instruction from the jury charge.

Petitioner argues that any conclusion by the trial judge reflecting a belief that, following enactment of CRA-91, a plaintiff was responsibile for overcoming a "business justification" explanation for an identified discriminatory disparate impact, had the effect of creating a substantial injustice. Such a

requirement exceeded the statutory burden which became effective following the enactment of CRA-91 and imposed a proof formulation which had been overruled by Congress.

The district court's determination that CRA-91 was not "retroactive" and would not be "applicable" at trial called for a continuation of the same (overruled) Wards Cove burden of proof standard that was in existance prior to the Act's effective date. The heightened expectations and correspondingly diminished perceptions of the merits of a plaintiff's case which are implicit in such a proof assignment significantly reduced Hartnagel's chances of prevailing in his disparate impact claim.

Withholding a substantial benefit and right which had been created by a federal statute abridged Hartnagel's Fourteenth Amendment due process rights and denied him a fair hearing and a jury determination regarding of the disparate impact cause of action this lawsuit presents.

d. IMPOSITION OF AN UNDULY RESTRICTIVE EVIDENTIARY TEMPORAL LIMITATION PREVENTED A FULL AND FAIR HEARING OF THE CLAIMS PRESENTED.

Hartnagel's request to be permitted to

continue his assignment in the newly-formed unit which assumed responsibility for the functions of his former 7-state region was denied by his employing unit on November 24, 1986. Following submission of a formal complaint under respondent's "Open Door" program, a previously discussed offer of employment was withdrawn, and for a total of thirteen months, while his job title remained unchanged and his compensation continued, he was prevented from functioning as an active employee. During this period, a five month communication "blackout" was imposed and his only available option was restricted to acceptance of "voluntary" separation on a cash buyout basis. In January, 1989, he was placed on involuntary layoff. This lawsuit was initiated on April 29, 1988.

On the first day of trial, Hartnagel's testimony provided a comprehensive account of the 13-month period, and subsequent four months of layoff, which preceeded the filing of this lawsuit. On the second day of trial, Hartnagel's attorney presented and individually described to the court--in conjunction with an

explicit offer of proof--a total of 20 proposed Plaintiff Trial Exhibits reflecting hiring, internal transfer, compensation and separation data which was directly applicable to the adverse impact which Hartnagel had identified within his immediate work group. Ten of the exhibits were summary documents reflecting continuing employment practices which plaintiff has alleged produced the patttern of discrimination this lawsuit indentifies. The remaining ten exhibits contained source data for the summary documents.

On the second day of trial, the district court ruled that no exhibits--or testimony--describing employment data prior to calendar year 1986 (the same year in which Hartnagel's active employment ceased) could be introduced at trial. The ruling had the effect of requiring the plaintiff to prove, on a preponderance of the evidence basis, that he had been a victim of unlawful discrimination <u>which occurred after he had been displaced</u> from active employment.

The trial judge clearly misapprehended the timing of Hartnagel's displacement, despite the

testimony which had been presented on the preceeding day and the description his attorney had provided in support of submission of the employment data.

In Defendant's Second Ammended Motion In Limini, submitted one day prior to the start of trial, respondent requested that plaintiff be instructed not to make comments in the presence of the jury concerning any alleged incident of discrimination occurring prior to April 29, 1986, since according to General Motors,

> "...any such acts of discrimination would be barred by the two-year statute of limitations applicable to the Age Discrimination in Employment Act, or any alledged incident of sex discrimination ...occurring prior to April 19, 1987, which is approximately 300 days prior to his filing of a charge of discrimination with the EEOC, for they are barred by the Plaintiff's failure to exhaust his administrative remedies under Title VII of the Civil Rights Act of 1964."

Under the continuing violation theory, a plaintiff who shows a continuing policy and practices which operated within the statutory period has satisfied the requirement that a discrimination charge be filed with the EEOC no later than 300 days following the discriminatory act. Where the last act alledged to be part of an ongoing pattern of

discrimination occurs within the filing period, allegations concerning the earlier acts are not time barred. Wilkins v. Walters D.C. Ohio, 1983, 571 F.Supp. 474; Jones v. Birdsong, D.C. Miss, 1980, 683 F.2d 417, 103 S.Ct. 1186, 459 U.S. 1202, 75 L.Ed.2d 433. See also, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973) ("statistics as to petitioner's employment policy and practice may be helpful to a determination of whether case conformed to a general pattern of discrimination against black's"); Cambridge, 590 F.2d at 206 (evidence of employer's "pattern of action" is relevant)

In EEOC v. Recruit U.S.A., Inc., 939 F2d 746, 755 (9th Cir. 1991) the court found,

> "[s]uperimposing an artificially truncated time frame would risk excluding evidence relevant to previous instances of similar discriminatory practices."

Trial testimony and extensive pre-trial pleadings clearly identified the continuing adverse impact of a pattern of conduct which extended over a 28 month period immediately preceeding Hartnagel's displacement from active employment. The trial court's ruling imposed a 325-day evidentiary temporal limitation--the

statutory period roughly equivalent to the limitation applicable to the filing of a charge of discrimination. This limitation had the practical effect of destroying, at the midpoint of trial, every numerical summary trial exhibit which had been prepared for trial and preventing all testimony identifying the numerical pattern which, under a Wards Cove-based burden of proof, must be established on a "preponderance of the evidence" basis to support a discrimination claim.

The district court's ruling was arbitrary and unfair; it deprived petitioner of a full and fair opportunity to support his claims; and in and of itself, prevented any reasonable chance of proving the discriminatory effect of the conduct which preceeded, and indeed produced the unlawful adverse impact this lawsuit identifies.

2. FEDERAL JUDICIAL DOCTRINE WHICH ASSIGNS AN UNEQUIVOCAL AT-WILL MEANING TO AN EXPRESS CONTRACT CREATING A CLAENDAR MONTH EMPLOYMENT RELATIONSHIP MISINTERPRETS CONTROLLING STATE LAW AND EXCEEDS CONSTITUTIONAL LIMITS

For more than 26 years, petitioner was employed persuant to an express agreement which stated in pertinent part,

"2. The employee acknowledges that his employment under this agreement is from month to month only on a calendar month basis."

In testimony at trial, Hartnagel described an exchange of correspondence which occurred immediately in advance of his final separation, wherein he confirmed his understanding of the calendar-month-only contractual basis of his employment and informed his management that a breach of contract had taken place. Attached to Hartnagel's letter, which was introduced into evidence at trial, was an exerpt from respondent's official Salaried Personnel policy manual stating,

"The contractual employment period of a Regular employee is a calendar month."

The policy manual reference specifically confirms petitioner's contention that the employment relationship created by this express agreement was based on...specified term... calendar month...contractual periods of employment--only--as in solely and exclusively.

While this specification does not in itself require a continuation of the employment beyond any established calendar month period, neither does it in any way create

a wavier of any rights existing or acrued during a contractual period under the agreement. Without a supplemental express understanding specifically confirming some other purpose, the contract term identified above does not create or infer a mutual intent to relieve the employer of an obligation to provide "just cause" notice of termination within the operation of an existing calendar month contract.

As indicated by respondent's own personel policies, the contract specification was intended and believed by both parties to have precisely the opposite meaning. A contractual-calendar-month-only specification negates any at-will presumption which might otherwise attach to an employment relationship which was based solely on a "month to month" contract specification.

Following completion of both plaintiff and defendant case presentations at trial, however, the district court declined to submit a proposed breach of contract instruction to the jury seeking a determination of the fact issue applicable to Hartnagel's subsequent reliance

on an express promise of Job Security. This promise was made by General Motors 12 years after the initial agreement was signed.

Entirely unlike a general operating guideline which is communicated to employees in a company manual or emoloyee handbook, respondent's Job Security commitment was a separate, formal communication, personally addressed to each salaried employee and distributed immediately prior the start of a major downsizing program. This communication included a direct assurance to individuals who had been employed longer than five years that length of sevice would be the primary consideration "in any reduction in force situation." The announcement was not accompanied by any expressed or implied disclaimer.

A company bulletin which preceeded this communication described the Job Security commitment in the following manner:

> "It is a mutual trust. A pledge of good faith, from GM to you. A renewed commitment for good times and bad."

A signed memorandum accompanying the communication Hartnagel received included the

direct assurance that employees in his job classification were covered by respondent's promise, and announced that, with respect to management employees, a valuable second consideration (involving a required exemption from an extended income layoff benefit program applicable to non-management salaried employees) was being required in exchange for their inclusion under this pledge.

In declining to permit the submission of a breach of contract question to the jury, the district court ruled,

> "I find there is no modification of the month-to-month employment agreement and that under the law, and I think the law in Texas as well as Michigan, that the month-to-month employment contract can be terminated at-will. And the -- Plaintiff has absolutely no right to get to the jury on the alledged contractual issue."

In support of this ruling, the court relied on a 1987 Sixth Circuit opinion in Taylor v. General Motors, 826 R.2d 452 (6th Cir. 1987). No Texas case law has been identified by respondent General Motors in the course of this appeal which assigns an unequivocal at-will meaning to the particular contract specification presented above.

Following denial of a request for panel

rehearing in this appeal, the court below denied Hartnagel's petition for certification of a question of law to the Texas Supreme Court which was based, in part, on the contract issue identified above.

The district court's determination--made in conjunction with a trial proceeding which took place seven months after Hartnagel's employment had ended--assigned an after-the-fact at-will interpretation to a contractual relationship which in fact had consisted solely of specified term calendar month contractual periods of employment--not even one of which, under Texas law, had been subject to termination on an at-will basis.

Petitioner contends that the federal judicial doctrine reflected in both the Sixth Circuit opinion and district court breach of contract ruling is based on a fundamental misunderstanding of the employment circumstances applicable to both the Taylor and Hartnagel cases and represents an incorrect interpretation and statement of controlling state law. Both of the decisions are in conflict with the direction this Court provided

in Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

The district court's application of Sixth Circuit doctrine to govern disposition of the question of Texas employment law which was presented in this lawsuit abridged petitioner's due process rights under the Fourteenth Amendment of the U.S. Constitution.

a. TEXAS AND MICHIGAN LAW DOES NOT ASSIGN AN UNEQUIVOCAL AT-WILL STATUS TO "CALENDAR MONTH" CONTRACTS ABSENT A SUPPLEMENTAL UNDERSTANDING.

Acceptance of the unequivical at-will interpretation of the contract provision "month to month only on a calendar month basis" requires an arbitrary presumption that the word "only" modifies the phrase "month to month" which immediately preceeds it. Considering the fact that the central (and unequivical) meaning inherent in the full sentence is that the parties clearly intended to create a calendar month employment relationship, it is at least equally reasonable to presume that the word "only" modifies the phrase "on a calendar month basis."

Under Michigan law, an at-will designation based on the stated terminology requires the parties to reach an additional mutual

understanding which clearly acknowledges an employer's right to terminate the relationship on an at-will basis. No such acknowledgement was shown to exist under the circumstances applicable to the Sixth Circuit's Taylor decision, nor has General Motors established that Hartnagel ever signed or was asked to sign such a statement. Rather, the Taylor decision, upon which the district court's ruling was based, appears simply to make reference to the unequivocal language in the "sign off sheet" which had been signed by the plaintiff in an entirely separate case, Dell v. Montgomery Ward, 811 F.2d 970 (6th Cir. 1987).

In Howell v. Career Decisions, Inc., 100 Mich.App. 561, 298 N.W.2d 915 (1980), the Michigan Court of Appeals confirmed that absent an agreement otherwise (emphasis added) the employee for an indefinite term (emphasis added) is terminable at will. While, standing alone, the term "month to month" may indeed create an indefinite term employment relationship, an agreement reflecting a mutual acknowledgement that employment will be only on a calendar month basis prevents any automatic

at-will termination presumption during and within an established calendar month specified term.

Texas employment law follows the general rule practiced in England, which dictates that "a hiring at a stated sum per week, month, or year, is a definite employment for the period named and may not be arbitrarily concluded." Dallas Hotel Co. v. Lackey, 203 S.W. .2d 557, 561 (Tex.Civ.App.--Dallas 1947, writ ref'd n.r.e.); Molnar v. Engels, 705 S.W. .2d 224, 225 (Tex.App.--San Antonio 1986). The employment contract which is at issue in this lawsuit also incorporated an agreed monthly compensation amount which was to be payable for services rendered by the employee "in any and every capacity" during the established contractual period.

Under Texas law, where an employee remains by request of his employer after the term originally contemplated has expired, it is presumed that the extended term is subject to the agreed terms of the employment. Houston Ice & Brewing Co. v. Nicolini (1906, CA) 96 SW 84, writ. ref. Thus, another weekly, monthly, or

other term commences at the expiration of each of the periods that the employment continues. Young v. Lewis (1852) 9 Tex. 73.

The Texas Supreme Court adopted the Texas employment-at-will doctrine in East Line and Red River R.R. Company v. Scott, 72 Tex 70 10 S.W. 102 (1888), by stating,

> "...when the term of service is left to the discretion of either party (emphasis added), or the term is left indefinite, or determinable by either party (emphasis added), that either party may put an end to it at will and so without cause."

The at-will rule does not apply where the employer explicitly contracts to provide employment for a definite duration. (A. Corbin, Corbin on Contracts, Section 96.)

b. AN AT-WILL CONTRACT DOES NOT RELIEVE AN EMPLOYER FROM HONORING AN EXPRESS JOB SECURITY COMMITMENT.

Texas courts have long recognized that an agreement between an employer and employee can modify what would otherwise be an at-will employment arrangement. (United Transportation Union v. Brown, 694 S.W.2d 630 Tex.App.-- Texarkana 1985, writ refd n.r.e.)

In Johnson v. Ford Motor Co., 690 S.W.2d 90 (Tex.App.-- Eastland 1985, writ refd n.r.e.,

the Court of Appeals determined that an at-will situation also can be modified by an oral agreement with supervisory personnel. The Fifth Circuit has held that "a drivers rule book" could be the foundation for the implication of a "just cause provision" in the discharge of a bus driver. Smith v. Kerrville Bus Co., 709 F.2d 914 (5th Cir. 1983)

In Aliello v. United Air Lines, Inc., 818 F.2d 1196 (5th Cir. 1987) at 1199, the Fifth Circuit stated, "under Texas law, an agreement between an employer and employee can modify what would otherwise be an at-will employment relationship." In rendering this opinion, the court took special notice of the circumstances addressed in Cleary v. American Airlines, 111 CalApp.3d 433, 168 Cal Rptr. 722 (Ca.2d Dr. Div 1. 1980, which recognized that, by creating practices which bind the employees and which purport also to be binding upon themselves, an employer...

> "could lead the employees to think that they are entitled to the rights which the company promises them. But then, when the company wishes to do so, it simply takes the position that its promise...has no meaning and that the company is free to discharge these longterm faithful employees for any reason, or for no

reason, and with no procedural protections.

> "Of significance to the case before us is the fact that while the company urges the "at will" right to discharge, it did actually recognize the employee's right to...use the procedures contained in the company regulations. But then when all this was done, the company now falls back on the "at-will" concept when the employee takes the next step in challenging (the discharge) by bringing a breach of contract suit in court. The strong element of misleading employees as to their rights and then cutting them off after seemingly granting them is, of course, what led the California court in the Cleary case to find that the company was estopped to claim "employment at will"..."

Under Texas law, the doctrine of detrimental reliance requires a showing of the existance of a promise "designedly made to influence the conduct of the promisee, tacitly encouraging the conduct, which conduct, although not necessarily constituting any actual performance of the contract itself, is something that must be done by the promisee before he could begin to perform, and was a fact known to the promisor. Wheeler v. White, 398 S.W.2d 93, 96 (Tex. 1965)

The doctrine of "promissory estoppel" was articulated by the Texas Supreme Court in English v. Fischer, 660 S.W.2d 521, 524 (Tex

1983) as requiring (1) a promise, (2) the promisor's foreseeability of the promissee's reliance thereon, and (3) substantial reliance by the promisee to his detriment. All of these elements were clearly shown to be present with respect to the express Job Security pledge which was announced to General Motors salaried employees.

It is well established that parol evidence of subsequent representations of job security is fundamental to the equitable resolution of questions of employment equity under contract law. Such representations raise questions of material fact which must be resolved by a jury. Butzer v. Camelot Hall Convalescent Centre, Inc., 163 Mich. App. 194 454 N.W. .2d 122, 5 IER Cases 1276 (Mich. Ct. App. 1989)

c. THE INTEGRATION CLAUSE INCORPORATED IN HARTNAGEL'S EMPLOYMENT AGREEMENT DOES NOT IMPAIR RELIANCE ON SUBSEQUENT AGREEMENTS.

Respondent General Motors has suggested in federal court proceedings across the country that the language of paragraph 5 of the basic agreement governing employment of its U.S. salaried employees denies legal force to agreements occurring subsequent to the

execution of this document which are not initialled on the original employment contract. (See also Winters v. General Motors Corp., 715 F.Supp. 54 (W.D.N.Y. 1989) Petitioner argues that acceptance of this conclusion requires the same sort of unsupportable presumption concerning the intent of the parties as the one described earlier which attaches an at-will effect to paragraph 2 of the same agreement.

The integration clause incorporated in Hartnagel's contract states:

> "5. The Employer and the Employee acknowledge that there are no other arrangements, agreements, or understandings, verbal or in writing, regarding same and that any modification or ammendment hereof, other than a cancellation and replacement hereof by another written form of agreement, must be endorsed hereon in writing and initialed by both the Employee and the Employer." (emphasis added)

It is usual within the context of corporate employment relationships that a considerable number of contractual "understandings" may be created both before and after a basic employment agreement is signed (including for example, those dealing with "exempt" status under the Fair Labor Standards Act; benefit plan administration or even

savings bond payroll deductions). By signing a basic employment agreement, the parties obviously did not intend to acknowledge that none of these agreements would have legal effect unless they were initialled on the original contract.

Clearly, the terminology "regarding same" and "hereof" was intended to refer solely to changes which would have the effect of altering the particular specifications which are set forth in paragraphs 1-4 of the employment agreement itself. It cannot be reasonably asserted that this limitation was ever meant to acknowledge or to reflect an intent of the parties to prohibit either the formation of, or reliance on, subsequent agreements which did not alter these specific contract terms.

Any suggestion that this basic employment agreement either prevents or impairs the legal force of subsequent express agreements or understandings applicable to other aspects of the employment relationship--such as the incidents or priviledges of employment which result from an express promise of Job Security applicable during a continuation of that

employment--is not and cannot be supported on the basis of the language of paragraph 5 of Hartnagel's employment agreement.

d. THE FEDERAL DOCTRINE ESTABLISHED IN THE TAYLOR DECISION AND RELIED ON IN THE TRIAL COURT'S RULING EXCEEDS LIMITS PLACED ON FEDERAL JUDICIAL AUTHORITY BY THE U.S. CONSTITUTION.

A federal judicial doctrine which, unlike controlling state law, assigns an unequivocal at-will meaning to a calendar-month-only contract (absent a supplemental express understanding regarding "just cause" termination) is in direct conflict with the decision this Court rendered in Erie R.R. v. Tompkins. The "Erie doctrine" provides that federal courts have no power to create a body of general federal common law to govern substantive rights, and that this power is reserved to the states under the Tenth Ammendment of the U.S. Constitution.

A property interest in employment sufficient to invoke procedural due process protection may be created by ordinance or by implied contract. Glenn v. Newman, 614 F.2d 467 (5th Cir. 1980) Sufficiency of a claim of entitlement to due process protection based on a property interest in employment must be

decided by reference to state law or implied understandings between the parties. Davis v. Nuss 432 R.Supp 44 S.D. Tex. (1977); Bishop v. Wood, 426 U.S. 341, 435 and L.Ed.2d 684 (1976).

The trial court's incorrect statement of Texas law and refusal to submit a breach of contract instruction to the jury deprived Hartnagel of a Fourteenth Amendment due process right to redress the harm inflicted by his employer's failure to perform on an express promise of job security. The judicial doctrine which produced this error should be reexamined and revised by this Court to bring federal employment contract interpretation into conformance with controlling state law.

3. THE USE OF JUDGEMENT ORDERS TO DISPOSE OF ISSUES PRESENTED FOR APPELLATE REVIEW EXCEEDS THE AUTHORITY THIS COURT HAS GRANTED WHERE THE MATTERS UNDER REVIEW REQUIRE NEW INTERPRETATIONS OF FEDERAL STATUTES OR INVOLVE NEW APPLICATIONS OF THE LAWS OF DIFFERENT STATES

In N.L.R.B. v. Amalgamated Clothing Workers of America, AFL-CIO, L.990, 430 F.2d 966 (1870), the Fifth Circuit Court of Appeals stated:

> "Foremost , we are a court of review and in the Federal system a court of review of cases in which appeal is nearly always a right, not a certiorari-type

discretion...

> "A most important function is the writing of opinions. Opinions are to serve a number of purposes at least two of which are highly significant. One is that an articulated discussion of the factors, legal, factual or both, which lead the Court to one rather than to another result, gives strength to the system, and reduces, if not eliminates, the easy temptation or tendency to ill-considered or even arbitrary action by those having the awesome power of almost final review. The second, of course, is the very discursive statement of those articulated reasons is the thing out of which law--and particularly Judge-made law--grows. It is an essential part of the process of the creation of principles on which predictions can fairly be forecast as a basis for conduct, accountability, or the like...
>
> "By Rule 21 the Court not only implicitly assumes the responsibility...but also is specifically commanded to make the conjunctive judicial determination that an opinion would have no precidential value...Rule 21...must be sparingly used." (at pg. 972)

Petitioner is aware of the beneficial and essential reasons for employing the "Affirmance Without Opinion" mechanism to administer the great number of appeals which must be addressed, and fully appreciates the need for "husbanding limited and precious judicial resources" by eliminating unnecessary opinions.

The issues addressed in this petition are believed to present matters of significant

legal precident requiring new interpretations of a federal statute, federal judicial doctrine and state law. Affirmance Without Opinion did not provide an appropriate disposition for this appeal.

K. CONCLUSION

In the Landgraf and Rivers decisions, this Court specifically acknowledged the possibility of encountering exceptions to the general non-retroactivity guidelines which these opinions set forth. This petition presents just such a clear and legitimate exception.

Resolution of the lingering uncertainties surrounding the effect and intent of the Civil Rights Act of 1991 is of immense importance to individuals whose lawsuits, like this one, have traversed a legal process which has spanned the entire period during which these major procedural changes were taking place.

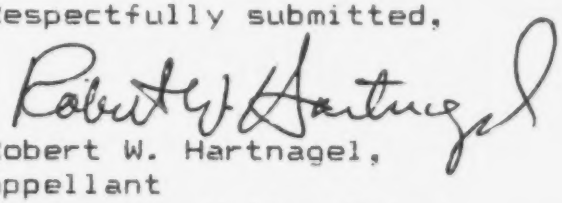
The Sixth Circuit opinion in Taylor v. General Motors Corp., incorporates a federal judicial doctrine which improperly denies employees an important contractual right. The application of this doctrine on an after-the-fact basis to prevent jury

consideration of a breach of contract question reflecting an employee's reliance to detriment on an express promise of Job Security significantly extends the harm this doctrine can inflict. Reconsideration of this opinion and the trial practice it has produced is both appropriate and necessary.

For the reasons herein stated, this Court should remand this case for retrial on the merits of petitioner's discrimination and breach of contract cause of action.

Dated this 6th day of March, 1995.

Respectfully submitted,



Robert W. Hartnagel,
Appellant
7605 Carta Valley Drive
Dallas, Texas 75248
Telephone: (214) 233-8090

CERTIFICATE OF SERVICE

Persuant to Supreme Court Rule 29.5, I hereby certify that on this 6th day of March, 1995, forty copies of the above and foregoing Petition for Writ of Certiorari were mailed to the Clerk of the Supreme Court of the United States by depositing the same in the United States mail at Dallas, Texas, first class, postage prepaid, addressed to the Clerk, the Supreme Court of the United States of America, Washington, D.C. 20543. I also certify that two true and correct copies of the above and foregoing Petition for Writ of Certiorari were mailed to the persons identified below by depositing the same in the United States mail at Dallas, Texas, first class, postage prepaid, and properly addressed to:

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

James K. Peden
Strasburger & Price
Counsel to General Motors Corp.
901 Main Street
Dallas, Texas 75202

Robert W. Hartnagel

# APPENDIX

Court of Appeals Decision, September 6, 1994

Trial Court Final Judgement, January 31, 1992

(Filed September 6, 1994)

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

---

No. 92-1176

---

ROBERT W. HARTNAGEL,

Plaintiff-Appellant

versus

GENERAL MOTORS CORPORATION,

Defendant-Appellee

---

Appeal from the United States District Court
for the Northern District of Texas

---

(CA3-88-0396-R)

Before GARWOOD, JOLLY and STEWART,
Circuit Judges.*

PER CURIAM:

AFFIRMED. See Local Rule 47.6

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* Local Rule 47.5 provides: "The publication of opinions that have no precidential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Persuant to that Rule, the Court has determined that this opinion should not be published.

(Filed January 31, 1992)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROBERT W. HARTNAGEL,

Plaintiff

vs. CA 3-88-0396-R

GENERAL MOTORS CORPORATION,

Defendant.

FINAL JUDGEMENT

Based upon the jury verdict, judgement is entered in favor of the defendant General Motors Corporation, ant this case is DISMISSED with prejudice, with costs taxed against the plaintiff Robert W. Hartnagel.

SIGNED THIS 31st DAY OF JANUARY, 1992.

s/ Jerry Buchmeyer

UNITED STATES DISTRICT JUDGE
JERRY BUCHMEYER

Supreme Court, U.S.
FILED
APR 6 1995
OFFICE OF THE CLERK

No. 94-1484

In The

# Supreme Court of the United States

October Term, 1994

ROBERT W. HARTNAGEL,

*Petitioner,*

v.

GENERAL MOTORS CORPORATION,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit erred in affirming the District Court's refusal to provide a jury instruction conforming to the standards and burden of proof requirements imposed by Section 105 of The Civil Rights Act of 1991 (42 U.S.C. § 2000e-2(k)(1)(A)(i)) in a sex discrimination suit arising out of circumstances which occurred before November 21, 1991, the effective date of the Act, and tried after that date.

2. Whether the Court of Appeals for the Fifth Circuit erred in affirming the district court's grant of Respondent's motion for judgment as a matter of law with respect to Petitioner's state law breach of employment contract claim on the basis that Petitioner's contract was terminable at will.

3. Whether the Court of Appeals for the Fifth Circuit can be required to issue an opinion in deciding Petitioner's appeal.

## LIST OF PARTIES

*Petitioner*: Robert W. Hartnagel

*Respondent*: General Motors Corporation

## RULE 29.1 LISTING

General Motors Corporation has no parent company. According to its Form 10-K Annual Report for the year ended December 31, 1994, filed with the Securities and Exchange Commission, domestic subsidiaries of General Motors Corporation not wholly owned are the following:

GM Ovonic, L.L.C.
EDS Personal Communications Corporation
Federal Computer Services Corporation
Subarban Limited Liability Company.

For the additional information of the Court a list of all General Motors Corporation subsidiaries, joint ventures and affiliates, both foreign and domestic, updated to April 3, 1995, has been provided to the Clerk of the Court.

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No. 94-1484

In The

# Supreme Court of the United States

October Term, 1994

ROBERT W. HARTNAGEL,

*Petitioner,*

v.

GENERAL MOTORS CORPORATION,

*Respondent.*

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

## BRIEF IN OPPOSITION

## OPINIONS BELOW

Petitioner's claims were denied by the District Court and that denial was affirmed by the Court of Appeals without the issuance of an opinion by either court. Conformed copies of the Final Judgment in the District Court and the Order of Affirmance in the Court of Appeals are attached as Appendices to the Petition for Writ of Certiorari.

## JURISDICTION

The Court of Appeals affirmed the District Court's judgment on September 6, 1994. Petition for Rehearing and a Suggestion for Rehearing En Banc were denied by the Court of Appeals on October 27, 1994. This Court has jurisdiction to review the judgment in this case in the Court of Appeals pursuant to 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction of this matter under 28 U.S.C. § 1291 as an appeal from a final judgment of the District Court. The District Court had jurisdiction to hear the merits of Petitioner's initial age discrimination claim under 29 U.S.C. § 626(c)(1) and to hear Petitioner's breach of contract claim under the doctrine of pendent jurisdiction.

## STATUTE INVOLVED

42 U.S.C. § 2000e-2(k) provides in pertinent part the following:

> "(k) **Disparate impact as a basis of practice**
>
> (1)(A) an unlawful employment practice based on disparate impact is established under this subchapter only if –
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; * * * ."

42 U.S.C. § 2000e(m) provides the following:

> "The term 'demonstrate' means meets the burdens of production and persuasion."

## STATEMENT OF THE CASE

### (1) Nature of the Case, Course of Proceedings and Disposition in the Court Below.

This action was originally brought by Robert W. Hartnagel ("Hartnagel") on April 29, 1988, against General Motors Corporation ("General Motors") for alleged discrimination on the basis of Hartnagel's age in violation of 29 U.S.C. § 623(a) and for the alleged breach of an employment contract. Hartnagel later amended his complaint to include a claim of sex discrimination in violation of 42 U.S.C. § 2000e-2(a). At the conclusion of all the evidence in the case and before submission of the case to the jury the District Court granted judgment as a matter of law for General Motors on Hartnagel's breach of contract claim.

With regard to Hartnagel's claims of age and sex discrimination, the District Court instructed the jury that it should find for Hartnagel if Hartnagel proved that age or sex was a determining or motivating factor in General Motors' decisions leading to Hartnagel's termination of employment. The jury was further instructed that if General Motors' decisions regarding Hartnagel were made as a matter of business judgment and not because of Hartnagel's age or sex then the jury should find for General Motors, and further, that if Hartnagel presented evidence

of age or sex discrimination and General Motors presented evidence of a non-discriminatory reason for its actions, Hartnagel would have the burden of proving that the reasons offered by General Motors were a pretext. The District Court refused to submit the following jury instruction requested by Hartnagel:

> "Plaintiff claims in this case that Defendant had or has an unlawful employment practice based on disparate impact. An unlawful employment practice based upon disparate impact is established if the plaintiff demonstrates that Defendant uses or used a particular employment practice that causes a disparate impact on the basis of sex. The Defendant then has the burden of proving that the challenged practice is job related for the position in question and consistent with business necessity. Plaintiff need not prove Defendant's discriminatory intent in a disparate impact case. He only needs to show that a facially neutral employment criteria disproportionately disqualifies persons similarly situated to the Plaintiff from employment with the Defendant."

In support of his request Hartnagel relied in part upon Section 105 of The Civil Rights Act of 1991 (the "Act") (42 U.S.C. § 2000e-2(k)(1)(A)(i) (hereinafter "Section 105")). In a verdict returned January 30, 1992, the jury found that Hartnagel did not prove that General Motors discriminated against him because of his age or because of his sex. A final judgment based upon the jury verdict dismissed the entirety of the case with prejudice.

**(2) Statement of Facts.**

**(a) Hartnagel's Employment History.**

Hartnagel started work with General Motors in May 1960. In 1975 he was sent to Dallas, Texas, as regional manager of General Motors' public relations office in that city. In 1981 General Motors made a management decision to begin closing regional public relations offices. This led to office closings in Boston, Indianapolis, San Francisco and Southfield, Michigan. In 1984 there was a further restructuring of the entire corporation resulting in closings of public relations regional offices in Jackson, Mississippi, Buffalo, Cleveland, Kansas City and Philadelphia. Plans were developed at the same time to close Dayton, Atlanta and Dallas offices in 1986. As early as 1984 Hartnagel was told of the possibility that the Dallas office would close.

While Hartnagel was in Detroit in the latter part of October 1986, one of his supervisors, Bill Quigley, advised him that the Dallas office would close at the end of the first quarter of 1987. Quigley gave this advance notice to Hartnagel because he was aware of the medical condition of Hartnagel's wife, and felt he owed Hartnagel the courtesy of some advance notice because of his situation. Hartnagel did not challenge the decision to close the Dallas office, and was prepared to support the decision.

At this October meeting Quigley told Hartnagel that he wanted him to come to Detroit for a comparable job as a public relations person for an executive. Alternatively Hartnagel could accept a separation with a cash buyout of one years' severance pay plus six months of medical

insurance coverage. Hartnagel returned to Dallas to discuss the situation with his wife.

Because the operations of the Dallas regional office were being merged into the Chicago regional office, Hartnagel asked Jim Crellin, his immediate supervisor, if he could continue in a regional assignment in the Chicago office. There was, however, a manager already in place in the Chicago office. Hartnagel also talked to Quigley again, but there was no change. He was told basically that the Detroit public relations position was the job Quigley needed someone to do, and Hartnagel was very qualified for the job. Hartnagel then went to Detroit and talked to Jack McNulty, the vice president in charge of public relations for General Motors. He was again advised that plans were firm and there was no way to change. Following the meeting with McNulty, Hartnagel received a letter which confirmed the offer of the position in Detroit comparable in level and salary to his current position.

After meeting with McNulty, Hartnagel returned to Dallas and told his staff of the anticipated closing of the Dallas office. After receiving a phone call from Crellin in Detroit, who was upset that Hartnagel had informed his staff of the Dallas closing, Hartnagel began suffering chest pains. His doctor advised him to go home and rest, following which Hartnagel requested sick leave. During this time Hartnagel prepared letters to General Motors complaining of the treatment he was receiving from the company. He subsequently had several conversations with Jim Berschback, a General Motors personnel staff member assigned to investigate Hartnagel's complaints. In one of those conversations Berschback informed him

that the Detroit job was no longer available. By that point Hartnagel had made it known that he could not accept the job in Detroit, and the job had been filled by another experienced General Motors public relations employee.

Hartnagel stayed on sick leave until March of 1987 during which time he received full compensation and benefits. At that time Berschback called Hartnagel and told him his staff had not yet been able to identify a job for Hartnagel, and that a member of his staff would contact Hartnagel to discuss the situation with him when a position was identified. Nothing happened until August 1987 when Berschback called to say that his staff was still unable to identify a job for Hartnagel and to inquire about Hartnagel's taking a separation package. During this time Hartnagel was continuing to draw his full salary and benefits.

In October 1987 Bill Quigley called with the offer of a new job in Warren, Michigan, a Detroit suburb, in a news relations position. This offer was at Hartnagel's present salary and would include all relocation expenses. An alternative offer was for a separation package involving a twenty-month severance payment ($100,000) plus six months of continued medical insurance.

Hartnagel went to Detroit about this position and while there visited with Helen Moye, another member of General Motors' personnel staff. Hartnagel told Moye what he really wanted was to stay in Texas to be with his wife, and that it would be devastating for him and his wife if he had to come to Detroit. What he needed was money to live on and medical benefits. At the end of their conversation it was agreed that he would go back to

Texas and wait for a call from her to try to give him what he wanted. Conversations continued through December and into January of 1988 when Hartnagel was placed on a "special assignment" for a period of six months in Dallas starting on January 1, 1988, during which he would get full pay and full benefits. He would then be laid off for two years, at seventy-five percent pay for the first six months and at sixty percent of his pay for the last eighteen months, along with full benefits for the entire period. The purpose of this arrangement was to provide a bridge to "thirty and out" (an option for retirement available after thirty years of service at General Motors).

Hartnagel's layoff status continued until April of 1990 when General Motors offered him still another position as a manager in the stockholder relations department, or alternatively, another retirement package. Hartnagel's initial response to this offer was to seek from the district court an injunction enjoining General Motors from extending the offer. After a hearing, however, Hartnagel withdrew his motion and accepted the position in Detroit.

Hartnagel worked in the stockholder relations department through the remainder of 1990 and into 1991. After Christmas of 1990, however, he told his supervisor, Dale Cooper, that he would have to continue on a part-time basis from that point on because he had personal problems at home in Dallas related to his wife's illness. He would work for a two week period and then would be gone for two weeks. Hartnagel initially used his vacation for this purpose, but ran out of vacation in April of 1991. He then sent Dale Cooper a memo advising her of his forecasted personal absences from that date forward

through June. This prompted a memo from the business manager of the public relations staff advising Hartnagel that any days in excess of his vacation days would be treated as personal leave days under General Motors' dependent care leave program, which would mean an absence without pay. Hartnagel would not agree to this arrangement and on May 6, 1991, sent his own memo to the business manager advising of his view that unpaid leaves of absence without Hartnagel's consent constituted a breach of contract and termination of his employment. He accordingly advised of his intent to begin drawing retirement benefits commencing July 1, 1991, further advising that his actions should not be taken as voluntary.

As of July 1, 1991, Hartnagel ceased to be on the General Motors' payroll.

**(b) Hartnagel's Sex Discrimination Claim.**

In support of his disparate treatment sex discrimination claim Hartnagel testified about statistical results of his study of employment information provided to him by General Motors in the course of this litigation. The gist of Hartnagel's study was that the percentage of females in the General Motors public relations staff increased in the years 1986 through 1989, that the percentage of females working in public relations for General Motors was over twice the percentage of females in General Motor's total work force, and that in the years 1986 through 1988 more males separated from the public relations staff than females.

Hartnagel offered no evidence isolating or identifying any specific General Motors employment practice alleged to be responsible for any observed statistical disparities. Rather, the only "employment practice" of which Hartnagel complained was his personal experience of not being offered the Chicago job he wanted, and only being offered jobs in Detroit which he felt he could not take and which he felt were designed to cause him to retire.

When asked what his statistical evidence had to do with his situation, Hartnagel responded, "It had to do with the fact that I am gone and they are there. I was offered jobs that were impossible for me to do and they were offered jobs that they could do. And that's the difference. The effect of the job that I was offered under my circumstances was to force me to accept separation." While Hartnagel claimed to have knowledge about the flow of applicants for positions with General Motors and the qualifications of applicants he offered no testimony in that regard.

**(c) Hartnagel's Contract.**

Hartnagel's Employment Agreement with General Motors provided in pertinent part the following:

> "1. The Employee agrees to devote his time and service in the employ of the Employer in such capacity as the Employer may direct.
>
> "2. The Employee acknowledges that his employment under this agreement is from month to month only on a calendar month basis.
>
> "3. In consideration of the services to be performed by the Employee for the Employer, in

> any and every capacity, the Employer agrees to pay the Employee, . . . , compensation at the monthly rate set forth on the 'Compensation Statement'. . . .
>
> * * *
>
> "5. The Employer and the Employee acknowledge that there are no other arrangements, agreements, or understandings, verbal or in writing, regarding same and that any modification or amendment hereof, other than a cancellation and replacement hereof by another written form of agreement, must be endorsed hereon in writing and initialed by both the Employee and the Employer."

Hartnagel claims a contractual obligation also arose out of a General Motors brochure entitled "A Renewed Commitment" apparently distributed to the public relations staff central office in 1982. The brochure stated in the part upon which Hartnagel relies, "Specifically, length of service now will be the primary consideration in any reduction involving employees with five or more years' length of service." Hartnagel also claims contractual obligations arose out of a 1982 five-page memorandum on the subject "Communications Brochure – Salaried Employee" distributed to regional managers which included the statement, "The commitment to improved job security applies to all salaried employes – including the Corporation's most senior and valued executive group."

**(d) Disposition of Hartnagel's Claims.**

At the conclusion of all evidence the district court granted General Motors' motion for judgment as a matter of law on Hartnagel's contract claims grounded upon the premise that the employment contract was terminable at will. The jury then found that Hartnagel did not prove that General Motors discriminated against him by constructively discharging him because of his age or because of his sex, and a final judgment was entered dismissing the entirety of the case with prejudice. That judgment was affirmed by the Court of Appeals without opinion.

## REASONS FOR DENYING THE WRIT

This writ should be denied because there are no "special and important reasons" for granting. Sup. Ct. R. 10.1. The Court of Appeals' affirmance without opinion of the District Court's denial of Hartnagel's claims presents no conflict with any decision of another court of appeals or of this Court, either apparent or implied. To the contrary, with respect to the only arguably significant federal issue in this case, the application of Section 105 of The Civil Rights Act of 1991 to this case, the District Court's refusal to apply Section 105 and the Court of Appeals' affirmance of the District Court's judgment, is entirely consistent with the guidelines established by *Landgraf v. U.S.I. Film Products*, ___ U.S. ___, 114 S. Ct. 1483 (1994), and *Rivers v. Roadway Express, Inc.*, ___ U.S. ___, 114 S. Ct. 1510 (1994).

The disposition of Hartnagel's breach of employment contract claim is likewise fully consistent with applicable Texas law regarding "at-will" employment agreements and with federal court application of that law.

As a further observation, the issue of application of Section 105 to this case is not one essential to its resolution. For the jury to have found for Hartnagel, it was necessary for him to have established, first, that he was constructively discharged, and second, a prima facie case of discrimination. He did neither. The evidence affirmatively shows that Hartnagel voluntarily terminated his employment notwithstanding extensive effort by General Motors to retain him as an employee. The evidence fails to establish prima facie discrimination.

Notwithstanding the change in burden of proof and the reinstitution of the concept of business necessity brought about by Section 105, the initial burden remains on a plaintiff claiming disparate impact sex discrimination to prove that a specific employment practice operates more harshly on one sex than another. A plaintiff must offer evidence "isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 656, 109 S. Ct. 2115, 2124 (1989) (citing and quoting *Watson v. Fort Worth Bank and Trust*, 490 U.S. 977, 994, 108 S. Ct. 2777, 2789 (1988)). Hartnagel's testimony regarding his own personal experience did nothing to isolate and identify any specific employment practices or any causal connection between an employment practice and any statistical disparity in General Motors' work force. Under these circumstances,

where no prima facie case of disparate treatment is established, it is unnecessary to reach the issue of the application of Section 105. *See, Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1372 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1641 (1994); *Torre v. Federated Mut. Ins. Co.*, 854 F. Supp. 790, 809 n.15 (D. Kan. 1994).

Nor do the issues raised by the Petition, assuming they are necessarily presented by the record in this case, warrant this Court's plenary attention.

**1. Section 105 of The Civil Rights Act of 1991 Is Not Applicable to Claims Arising Out of Circumstances Occurring Before Passage of the Act.**

Both *Landgraf v. U.S.I. Film Products*, ___ U.S. ___, 114 S. Ct. 1483 (1994), and *Rivers v. Roadway Express, Inc.*, ___ U.S. ___, 114 S. Ct. 1510 (1994), considered the retroactive effect of particular sections of The Civil Rights Act of 1991 in the context of cases pending in their respective courts of appeal at the time of passage of the Act. In both cases the conduct of each of the defendants upon which the claims against them were based occurred prior to passage of the Act. *Landgraf* addressed those parts of Section 102 of the Act, Pub. L. 102-166, 105 Stat. 1071, creating a right to recover compensatory and punitive damages for certain violations of Title VII of The Civil Rights Act of 1964 (codified at 42 U.S.C. § 1981a(b)), and providing for a trial by jury when such damages are sought (codified at 42 U.S.C. § 1981a(c)). *Rivers* focused on the application of Section 101 of the Act (codified at 42 U.S.C. § 1981(b)) defining the term "make and enforce

contracts" as used in Section 1 of The Civil Rights of Act of 1866 (codified at 42 U.S.C. § 1981(a)). In each case the courts of appeals' decisions declining to apply the respective provisions of the Act to events pre-dating passage of the Act were upheld. Notwithstanding the slightly different procedural context of the present case and that a different section of the Act is under consideration, the analysis in *Landgraf* and *Rivers* compels the conclusion that Section 105 of the Act is not applicable to Hartnagel's claim.

*Landgraf* resolves two general issues regarding retroactivity of the Act and reaffirms the general presumption against application of statutes to conduct pre-dating enactment of a statute.

First, the notion that anything in the text of the Act (with the exception of two minor provisions not applicable to *Landgraf*, *Rivers* or the present case) provides any indication of Congress' intent with respect to the retrospective or prospective reach of various provisions of the Act was rejected. *Landgraf* at 1493-95. Second, the absence of any meaningful legislative history of the Act was confirmed. *Id.* at 1495-96. Third, the Court has eliminated the "apparent tension," *Kaiser Aluminum Chemical Corp. v. Bonjorno*, 494 U.S. 827, 110 S. Ct. 1570 (1990), between the long-standing principle that "retroactivity is not favored in the law," as a consequence of which "Congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result," *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 109 S. Ct. 468 (1988), and pronouncements that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result

in a manifest injustice or there is a statutory direction or legislative history to the contrary." *Bradley v. Richmond School Board*, 416 U.S. 696, 711, 94 S. Ct. 2006, 2016 (1974). That has been accomplished by a reaffirmation of "the presumption against retroactive legislation [which] is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic," 114 S. Ct. at 1497, and recognition that the Court has "declined to give retroactive effect to statutes burdening private rights unless Congress has made clear its intent." *Id.* at 1499. As this Court observed:

> "But while the *constitutional* impediments to retroactive civil legislation are now modest, prospectivity remain s the appropriate default rule."

114 S. Ct. at 1501 (emphasis in the original).

Under the Court's analysis, however, a determination that no clear expression of congressional intent exists in favor of retroactivity does not end the inquiry because,

> "The statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct anti-dating the statute's enactment [citation omitted]. Rather the court must ask whether the new provision attaches new legal consequences to events completed before its enactment."

114 S. Ct. at 1499. The discussion of retroactivity was summarized in the following:

> "When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no

> need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear Congressional intent favoring such a result."

114 S. Ct. at 1505.

The present case involves Section 105 of the Act, particularly that portion of the section codified at 42 U.S.C. § 2000e-2(k)(1)(A)(i) previously quoted. As this Court has observed, The Civil Rights Act of 1991 is largely a response to a series of Supreme Court decisions interpreting The Civil Rights Act of 1866 and The Civil Rights Act of 1964. Of apparent particular concern to Congress was the decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S. Ct. 2115 (1989), specifically mentioned in both Sections 2(2) and 3(2) of the Act. Section 105 is in direct response to *Wards Cove. Landgraf*, 114 S. Ct. at 1489.

In *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849 (1971), this Court made clear that a neutral employment practice which operates to exclude minorities is nevertheless unlawful unless it serves a valid business purpose. "The touchstone is business necessity." 401 U.S. at 431, 91 S. Ct. at 853. Following *Griggs*, a number of federal decisions appeared to establish that in a disparate impact case involving a facially neutral employment practice if an

employee could demonstrate a *prima facie* case of unlawful discrimination, it was the burden of the employer to present and prove as an affirmative defense a business necessity for the practice in question. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 668 n.14, 109 S. Ct. 2115, 2131 n.14 (Stephens, J., dissenting).

In *Wards Cove*, however, it was held that if the plaintiff made out a *prima facie* case of disparate impact, the employer's burden would be to produce evidence of a business justification for the challenged employment practice. The Court observed that the justification could not be insubstantial; on the other hand, the challenged practice did not have to be "essential" or "indispensable" to the employer's business. The Court further observed that while it was the employer's burden to produce evidence of a business justification for his employment practice, the burden of persuasion would remain with the plaintiff. 490 U.S. at 657-59, 109 S. Ct. at 2125-26.

Section 105 clearly responds to *Wards Cove* and overrides it. Whether *Wards Cove* or Section 105 provides the rule applicable to this present case depends upon the answer to two questions. Is there any clear expression of congressional intent that Section 105 applies to events pre-dating passage of the Act? Would application of Section 105 to this case result in a retroactive application impermissible in the absence of a clear expression of congressional intent? The answer to the first question is no; the answer to the second is yes. Consequently, the statute does not apply.

As previously noted, in *Landgraf* this Court found no expression of congressional intent that the Act or any

section of it be applied retroactively. The *Landgraf* petitioners argued that such an expression is found in Section 402(a) of the Act (codified at 42 U.S.C. § 1981 note) which provides, "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." The argument was made that two provisions of the Act required prospective application in two specific circumstances, suggesting the conclusion that in all other circumstances the Act would apply retrospectively. This Court rejected that contention, believing that Congress would have chosen a more direct means of expressing any intent that the Act applied retrospectively. 114 S. Ct. at 1495.

This holding is emphasized here because one of the circumstances in which Congress has mandated that the Act apply only prospectively is to the parties in the *Wards Cove* case. Section 402(b) of the Act (codified at 42 U.S.C. § 1981 note). A specific exception for the *Wards Cove* parties does not support an inference that the Act is to be applied retrospectively in all other disparate impact cases. As this Court observed, this would be a surprisingly indirect means of conveying such an important message. A more likely explanation is that precedent on the retroactivity issue left doubts about what rules would apply in the absence of congressional guidance. Given that doubt, Congress did not want to leave to the courts the issue of whether the Act should or should not apply to the *Wards Cove* parties, and expressly provided it would not.[1] 114 S. Ct. 1495.

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[1] Likewise, Congress did not want to leave to the courts the issue of whether the Act would apply retrospectively to

In the absence of a clear expression of congressional intent that a statute operate retroactively, the inquiry is whether application of the statute in a particular case would have a retroactive effect. If it would, it should not be applied. *Landgraf, supra,* at 1505. Comparing the effect of Section 105 to Sections 101 and 102 considered in *Rivers* and *Landgraf,* respectively, confirms that use of Section 105 in the present case would be an impermissible retroactive application.

First, with respect to the burden of proof issue, *Landgraf* eliminates any notion that the burden of proof requirement incorporated in Section 105 should be given effect simply because it is a procedural matter. In *Landgraf,* it was observed that while the creation of a right to a jury trial might be considered a purely procedural matter applicable to trials taking place after the effective date of the statute, the jury trial provisions of Section 102 of the Act applied only to cases in which the complaining party sought the compensatory or punitive damages newly authorized by the same section. As a consequence, application of the jury trial option had to stand or fall with the damage provisions under consideration. 114 S. Ct. at 1505. Here, the statutory placement of the burden of proof in disparate impact cases is inextricably intertwined with Section 105 and its reordering of the elements of a disparate impact case. Application of that part of Section 105 (and Section 104) placing a burden of proof on the defendant must stand or fall with the remainder of Section 105.

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overseas employers, expressly providing that it would not. Section 109(c) of the Act (codified at 42 U.S.C. § 2000e, note).

Application of the "business necessity" standard imposed by Section 105 would be a clear retroactive application of the Act. Under Section 105, the burden now falls on the employer to demonstrate not just business justification for a challenged practice, but that the challenged practice is job related for the position in question and is consistent with business necessity. Under the statute, there is an obvious expansion of the definition of the type of conduct which could support a discrimination claim, that being conduct which, although justifiable as a business practice, is not essential or necessary to the employer's business. This has the effect of adding new legal consequences to past conduct, an effect which *Landgraf* clearly characterizes as retroactive. 114 S. Ct. at 1506-07. *See, Matthews v. Runyon*, 860 F. Supp. 1347, 1354, 1355 (E.D. Wis. 1994).

The retroactive effect of application of Section 105 to pre-enactment conduct is even more forcibly illustrated by *Rivers v. Roadway Express, Inc.*, ___ U.S. ___, 114 S. Ct. 1510 (1994), in which the Court considered application of Section 101 of the Act, in which Congress extended liability under 42 U.S.C. § 1981 to embrace all aspects of a contractual relationship, including contract terminations. The Court found this to be an even more clear example of retroactivity because of the expansion of the definition of conduct for which there could be liability under 42 U.S.C. § 1981, not just an expansion of the damage exposure brought about by Section 102. 114 S. Ct. at 1515. As noted above, Section 105 expands the liability of an employer to include those forms of conduct for which a business justification exists but for which there is no business necessity.

*Rivers* also directly addresses, and refutes, the primary argument advanced by Hartnagel in support of his contention that Section 105 should be applied retroactively. Specifically, the main thrust of Hartnagel's argument is that Section 105 should be applied in this case because it "restores" the law pertaining to disparate impact claims to the form in which it existed prior to the decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S. Ct. 2115 (1989). Hartnagel argues that because of the clearly expressed intent of Congress to overrule that decision, that decision should no longer apply, not even to conduct which pre-dated enactment of the "overruling" legislation. (Petition 17-29).

The petitioners in *Rivers* advanced the same argument, contending that Section 101 of the Act should apply in their case because it was "restorative" of the understanding of 42 U.S.C. § 1981 which prevailed before the decision in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363 (1989). The *Rivers* petitioners argued first that Congress' purpose of "restoring" pre-*Patterson* law indicated an affirmative intent that Section 101 be applied to cases arising before its enactment. They further argued that there exists a "presumption in favor of application of restorative statutes" to cases arising before their enactment. 114 S. Ct. at 1515. The *Rivers* petitioners also argued, as could be argued in this case, that where a new statute simply enacts a rule which the parties could have believed to be the law when they acted, the concerns of unfairness relating to retroactivity do not exist. 114 S. Ct. at 1517.

This Court rejected those contentions, concluding that the fact that Section 101 was enacted in response to

*Patterson* did not supply sufficient evidence of a clear congressional intent to overcome the presumption against statutory retroactivity. 114 S. Ct. at 1517. It further concluded that its prior decisions simply did not support the proposition that the Court had espoused a "presumption" in favor of retroactive application of restorative statutes. 114 S. Ct. at 1518. "A restorative purpose may be relevant to whether Congress specifically intended a new statute to govern past conduct, but we do not 'presume' an intent to act retroactively in such cases. We still require clear evidence of intent to impose the restorative statute 'retroactively.'" *Id.*

Here, there is no clear expression of congressional intent which would support the application of Section 105 to supplant *Wards Cove* as the law applicable to any Title VII disparate impact claim in this case.

In summary, no provision of The Civil Rights Act of 1991 indicates that Congress intended for any particular provision of the Act to be applied to claims arising out of events which occurred prior to its enactment. In the absence of any clear expressions of congressional intent, the presumption is that statutes will not be applied to have retroactive effect, even when the legislation supplants a judicial decision. Because Section 105 of the Act expands liability for conduct occurring prior to passage of the Act, its application to this case would have an impermissible retroactive effect. Accordingly, the district court acted correctly in declining to submit an instruction premised upon the business necessity and burden of proof provisions of Section 105 of the Act.

### 2. Hartnagel's State Law Breach of Employment Contract Claim Was Properly Denied.

Texas contracts providing for employment at will are terminable at any time by either party, with or without cause, absent an express agreement to the contrary. *Federal Express v. Dutschmann*, 846 S.W.2d 282, 283 (Tex. 1983); *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 489 (Tex. 1991). In an action for wrongful discharge an employee must prove that he and his employer had a contract that specifically limited the employer's right to terminate the employment contract at will. *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d 403, 406 (Tex. App. – Beaumont 1987, writ ref'd n.r.e.); *Webber v. M.W. Kellogg Co.*, 720 S.W.2d 124, 127 (Tex. App. – Houston [14th Dist.] 1986, writ ref'd n.r.e.). Federal decisions adhere to the Texas position that there can be no claim for breach of an employment contract unless specific express provisions limit the employer's right to terminate the contract at any time for any reason. *Spuler v. Pickar*, 958 F.2d 103, 106 (5th Cir. 1992); *Crum v. American Airlines, Inc.*, 946 F.2d 423 (5th Cir. 1991); *Zimmerman v. H.E. Butt Grocery Co.*, 932 F.2d 469, 471 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 591 (1991).

Hartnagel's month-to-month employment contract with General Motors contained no provisions which specifically, expressly or otherwise limited the right of either party to terminate the employment agreement. Characterization of Hartnagel's contract as "at will" is confirmed by decisions under Michigan law denying claims of wrongful termination of the identical contract. *Taylor v. General Motors Corp.*, 826 F.2d 452 (6th Cir. 1987); *Richards*

*v. General Motors Corp.*, 991 F.2d 1227, 1234 (6th Cir. 1993). The general rule in Michigan, as in Texas, is that in the absence of an agreement otherwise, an employee for an indefinite term is terminable at will.

Hartnagel further argues, however, that additional rights were conferred upon him by the communications from General Motors described previously. Under Texas law these communications by General Motors to its employees did not modify or supplement Hartnagel's employment contract. The brochure and memorandum upon which Hartnagel relies are comparable to handbooks and other policy statements which Texas courts have consistently held not to modify or otherwise limit a contract terminable at will. *Day & Zimmermann, Inc. v. Hatridge*, 831 S.W.2d 65, 69 (Tex. App. – Texarkana 1992, no writ); *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d 403, 406 (Tex. App. – Beaumont 1987, writ ref'd n.r.e.); *Reynolds Mfg. Co. v. Mendoza*, 644 S.W.2d 536, 539 (Tex. App. – Corpus Christi 1982, no writ). *See, Zimmerman v. H.E. Butt Grocery Co.*, 932 F.2d 469, 471 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 591 (1991).

Hartnagel's employment contract with General Motors was a contract terminable at will which obligated Hartnagel to devote his time and service to General Motors in such capacity as General Motors might direct. No breach of the contract resulted either from General Motors' inability to satisfy Hartnagel's employment demands or from Hartnagel's ultimate departure and retirement from employment.

### 3. The Court of Appeals Was Not Required to Issue an Opinion.

Rule 36, F.R.A.P., contemplates that the judgment of an appellate court may be rendered without an opinion. There is no requirement, constitutional or otherwise, that a federal appellate court issue a written opinion. *Furman v. United States*, 720 F.2d 263, 264 (2d Cir. 1983); *United States v. Baynes*, 548 F.2d 481, 483 (3d Cir. 1977). The Court of Appeals for the Fifth Circuit adopted a local rule formally authorizing affirmance or enforcement of an order without opinion more than twenty years ago. *National Labor Relations Board v. Amalgamated Clothing Workers of America*, 430 F.2d 966, 968 (5th Cir. 1970). This Court has approved that procedure (at least in the case of affirmances). *Taylor v. McKeithen*, 407 U.S. 191, 194, 92 S. Ct. 1980, 1982 n.4 (1972). The absence of an opinion in this case does not require this Court's review.

## CONCLUSION

Section 105 of the Civil Rights Act of 1991 does not apply in this case. Hartnagel's claim for wrongful termination of an "at-will" employment contract was properly denied. The Fifth Circuit was not required to issue an opinion. The Petition should be denied.

Respectfully submitted,

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CASE NO. 94-1484

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

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ROBERT W. HARTNAGEL,
Petitioner,

V.

GENERAL MOTORS CORPORATION,
Respondent.

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On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

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# PETITIONER'S REPLY BRIEF

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# PETITIONER'S REPLY BRIEF

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Respondent's Brief in Opposition incorrectly identifies the questions petitioner has presented for this Court's review; fails to respond to the Constitutional issues which have been raised; and presents an account of the events preceeding the filing of this lawsuit which is partially contradicted by documentary evidence introduced at trial. The suggestion that General Motors made an extensive effort to "retain" the plaintiff as an employee is thoroughly disingenuous.

## REPLY TO RESPONDENT'S STATEMENT OF FACTS

By concluding plaintiff's appeal on an "Affirmance Without Opinion" basis, the Fifth Circuit has deprived this Court of the factual predicate necessary to permit a full consideration of the issues and conduct addressed in this lawsuit. The harm which results from this absence of predicate is compounded by the fact that, in a number of highly significant ways, respondent's account of these facts is in direct conflict with the official record of this proceeding. In response, the following statements are offered:

I. Adverse pattern of conduct: Within its corporate and divisional Public Relations Staff operating units, respondent General Motors has used certain legitimate and appropriate aspects of its Affirmative Action programs as a smokescreen and a shield for accomplishing entirely unrelated company-wide cost-reduction objectives. In persuit of this end, older, mid-management, male Public Relations employees have been systematically displaced in order to accommodate a grossly disproportionate level of hiring and internal transfers of female

employees into lesser-paying Public Relations positions, instead of providing equitably apportioned opportunities for female advancement into high potential professional and technical career paths in other areas of the company. (A comprehensive description of this practice is presented in Exhibit 8 to Brief of Appellant, filed on June 18, 1993. Documentary evidence supporting this assertion is included in the Fifth Circuit Supplemental Record on Appeal, under the docket entry dated August 26, 1993.)

An official company document introduced at trial quotes the remarks of a Vice President in charge of plaintiff's operating unit who--concurrent with the start of a major downsizing program applicable to its public relations units--stated as follows,

> "I know that General Motors Public Relations stands right at the top of the list in hiring minority and female staffers, and that is important to the corporation, because there are many jobs where minorities and females are not yet at the level of experience where they can get into the top jobs in other areas. That's not true in Public Relations. We have to carry the burden for the corporation in this respect..."
>
> "And you know, you always think, "Gosh, who will replace old Joe?" But there

> is always somebody better coming up. Our job is to find that person and get him or her into that job."

Testimony and documentary evidence introduced at trial established that General Motors subsequently consolidated 12 of its regional operating units into 5 surviving regional offices. Within the 1986-89 temporal limitation period established by the district court--which followed plaintiff's displacement from a regional assignment--female representation in this work group increased from 14 to 40 percent, while total employment was reduced by 52 percent. During the same time period, females accounted for 16 percent of comparable salaried positions on a corporation-wide basis.

In accomplishing this redistribution of regional jobs, General Motors took the position that, when the operations of two formerly separate units were merged, one of the units had been "closed" and the jobs in that unit "eliminated", while the ongoing functions of both regional operations were assigned to the employees of the surviving office.

Despite a written assurance that employees

by an express promise of Job--repeat JOB, as opposed to EMPLOYMENT--security based on comparative length of service in ANY reduction in force situation, General Motors has disavowed any responsibility for honoring plaintiff's request to retain a position in the newly-formed unit which assumed his job responsibilities.

One day after the "closing" of plaintiff's former territory, an entirely new position was created in the newly-formed office which took over his former duties for the specific purpose of accommodating the transfer into this unit of another lesser-service employee at exactly the same level of responsibility.

II. Circumstances of termination: The "Statement of Facts" presented in respondent's Brief in Opposition recites the elements of a five-year General Motors pre-trial legal defense strategy initiated at the point of plaintiff's displacement from active employment in November, 1986.

Throughout the time these events were occurring, plaintiff's wife was attempting to

cope with severe vision, mobility and emotional limitations resulting from a 71-day hospitalization following a series of massive strokes. Continuing in the requested regional capacity--solely on a greater length of service basis--would have permitted Mrs. Hartnagel to retain a well-established support system of family and close personal relationships, and maintained the potential for eventually making a gradual transition to another city. The employment alternative provided by General Motors called for permanent relocation to a climate which would have dramatically restricted her mobility, away from familiar circumstances and without an established personal support group--or termination of plaintiff's employment at age 49 on a cash buyout basis (equivalent to separation pay) with medical coverage halted after six months.

Despite respondent's alleged desire to "retain" the plaintiff as an employee, trial documents establish that <u>four days</u> after plaintiff initiated an "Open Door" inquiry regarding his displacement from a position in General Motors' regional organization, a

meeting was held by Public Relations Staff management, with a corporate Personnel representative in attendance. A memorandum describing this meeting stated,

> "At the conclusion of this meeting, it was decided that arrangements would be made for Mr. Hartnagel to talk to an outplacement specialist."

A transcript of a tape recorded conversation with the Manager of General Motors Central Office Personnel Administration more than a year later included the following exchange:

> Plaintiff: "I think we agree on the impracticality of what has been proposed to me. To be candid with you, this thing has been structured so I had no other choice but to take the buyout."
>
> Personnel Manager: "I know. That's where I came in. And I disagreed with it."

Plaintiff did not "accept" the alleged offer of re-employment which occurred after he had been required to remain for two years on involuntary layoff status and more than three years after his reduction in force displacement had occurred. He reported under protest in the belief that this lawsuit would be brought to trial just three months thereafter. Instead,

this case was referred to mediation where it remained for a period of 12-months, while the personal expense and hardship of maintaining a second residence/commute relationship between Dallas and Detroit continued. The case was released from mediation eight days after plaintiff's employment was terminated.

To accomplish this termination, General Motors made a prohibited unilateral modification to the stated compensation and calendar-month-only specifications of the same basic employment contract which respondent now claims as an inviolate shield against having to honor its own express promise of job security.

## REPLY ARGUMENTS

I. This Court should grant the Petition to resolve a long-standing and broadly-significant Constitutional "Separation of Powers" question dealing with the prospective application of the Civil Rights Act of 1991.

Contrary to respondent's assertion, this petition does not request this Court's consideration of the retroactive application of Section 105 of the Act. The only retroactivity issue identified in this petition is whether, with respect to the post-Act trial of a pre-Act lawsuit, a Wards Cove-based disparate impact

proof formulation may be given continued retroactive effect after Congress has enacted legislation which reinstates the procedural burden of proof standard which existed at the point this lawsuit was filed and when the conduct upon which it was based was taking place.

Page 2 of respondent's brief states that Section 105 of the Act is entitled "Disparate impact as a basis of practice". The correct title for this section is "BURDEN OF PROOF IN DISPARATE IMPACT CASES". The brief also incorrectly substitutes the word "subchapter" for the word "title" in paragraph (k)(1)(A). The error is noteworthy because the term "title" in this context refers to the Act in its totality, thereby specifically confirming that Congress intended Section 105 to "provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964." Upon enactment of this statute, the procedural proof standard set forth in Section 105 should have become immediately effective on a prospective basis in subsequent trials wherein this application did

not have the effect of imposing a "new duty" on a "transaction already completed".

II. This Court should grant the petition for the purpose of eliminating the existing uncertainties regarding the respective plaintiff and defendant proof burdens which were established upon enactment of the Civil Rights Act of 1991.

A facially neutral employment practice which is applied within the context of a reduction in force involving the merger of two formerly separate operations by transfering all ongoing job functions to one of the merged units (without regard to the respective lengths of service of affected employees), while maintaining that the jobs of employees in the "closed" unit have been "eliminated", clearly presents the potential for producing an adverse impact based on protected age or gender characteristics.

Unlike the multiple selection criteria which can potentially influence an employer's individual hiring or promotion determinations, establishing a direct causal nexus between an identified age or gender-related disparity under this particular reduction in force practice is a rather straightforward

mathematical exercise. Such a relationship is unaffected by any consideration of applicant flow, relevant labor market, individual qualifications or characteristics, and is not dependant upon statistical samples or probabilities.

Under this practice, when an existing position was eliminated in a merger of regional Public Relations operating units, the change was based solely on a geographical "selection criteria". Any subsequent reassignment of a displaced employee following his elimination from the work group on this basis would become a matter for disparate treatment rather than disparate impact analysis, or for examination in the context of the defendant's rebuttal to a successful prima facie case demonstration.

For purposes of establishing a "rebuttable presumption" of discriminatory disparate impact, a plaintiff would meet his burden by identifying a facially neutral practice, direct causal nexus and substantially adverse impact within a relevant work group on the basis of protected age or gender criteria. Based on the evidence, testimony and pre-trial pleadings in

this case, plaintiff clearly met every required element of the assigned burden at trial, and supported this showing with a proof demonstration which was more than an adequate to satisfy the disparate impact prima facie burden applicable to the identified reduction in force practice. Moreover, this burden was met despite the extremely limiting effect of the 325-day evidentiary time frame requirement which is described elsewhere in this petition.

Precisely what the defendant's specific proof responsibility was <u>following</u> this demonstration forms the <u>pivotal consideration</u> and still unaddressed uncertainty underlying the question which has been posed in this petition and raised--so far without resolution--in this appeal. Plaintiff's lawsuit cannot be equitably concluded without a definitive response by this Court to the questions petitioner has presented.

CONCLUSION

The cumulative adverse effect of the district court error identified in this appeal was highly prejudicial to the plaintiff's case presentation at trial and deprived the jury of

the factual predicate needed to permit an informed judgement on the issues of this lawsuit.

For the reasons which herein presented, this Petition for a writ of certiorari should be granted.

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April 20, 1995